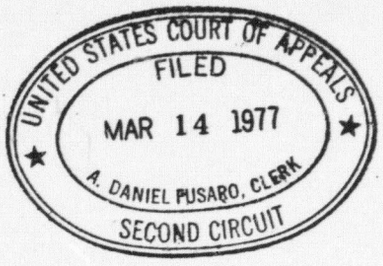
United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT



76-1581

To be argued by
DAVID J. GOTTLIEB

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

LINDA DISTEFANO and
SALLY DISTEFANO,

Defendants-Appellants.

Docket Nos. 76-1581
76-1582

BRIEF FOR APPELLANT
LINDA DISTEFANO

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

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BRIEF FOR APPELLANT LINDA DISTEFANO

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

QUESTIONS PRESENTED

1. Whether the Government failed to prove appellant Linda DiStefano's guilt of conspiracy or aiding and abetting a bank robbery.

2. Whether the trial court's erroneous and misleading instruction on appellant's false exculpatory statement compels reversal.

3. Whether the destruction by FBI Agent Sweeney of his notes on appellant's statements constitutes reversible error in light of the importance of the statement to the Government's case.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This appeal is from a judgment of the United States District Court for the Eastern District of New York (The Honorable Thomas C. Platt) rendered on October 22, 1976, convicting appellant Linda DiStephano of bank robbery and of conspiracy to commit a bank robbery (18 U.S.C. §§2113(a), 371, and 2), and sentencing her to a period of observation and study pursuant to 18 U.S.C. §5010(e). Appellant is on bail pending the determination of her appeal. By order of this Court, The Legal Aid Society, Federal Defender Services Unit, was continued as counsel for the appeal, pursuant to the Criminal Justice Act.

Statement of Facts

Appellant Linda DiStefano, her sister Sally DiStefano, and co-defendants Ronald Blanda and Patrick Edwards were charged with two counts of bank robbery and conspiracy to commit bank robbery.[1] The Government's theory was that Edwards and Blanda concocted a plan to rob the Chemical Bank in Holtsville, New York. Blanda and Edwards actually committed the robbery; Sally DiStefano furnished clothing and transportation for the robbers;

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[1]The indictment is set forth at "B" to the separate appendix to appellant Linda DiStefano's brief.

and Linda DiStefano's conduct was limited to having entered the bank several hours prior to the robbery to cash a dollar bill. The Government's theory was that she used that opportunity to "case" the bank.

On July 1, 1976, co-defendant Edwards was permitted to plead guilty to a single count of bank robbery (T.101-103[2]). Prior to trial, Ronald Blanda was killed in an incident at Metropolitan Correctional Center (T.3-4). Accordingly, on July 26, 1976, the Government went to trial against Sally and Linda DiStefano.

A. The Trial Evidence

The principal witness for the Government was co-defendant Edwards, who pleaded to one count of the indictment and testified in return for a promise by the Government to dismiss the two counts against him, to write a letter to the sentencing judge detailing his cooperation, to recommend a sentence to a drug rehabilitation program, and to promise to furnish Edwards with sleeping pills if he needed them (T.102-103). Edwards, a former narcotic addict with a habit costing up to $100 per day, admitted previous convictions for assault, petty larceny, loitering, and other misdemeanors (T.100, 148-149)[3].

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[2]Numerals in parentheses preceded by "T" refer to pages of the trial transcript.

[3]Edwards also acknowledged selling drugs to support his heroin habit (T.151-152, 212).

Edwards claimed he had been a friend of the DiStefano sisters for several years and that he had formerly dated Linda DiStefano. He had known Blanda for a number of years, the two having travelled together to a methadone maintenance clinic in which both were enrolled (T.103-108, 155, 163).

Six months before the robbery, Edwards and Blanda began discussing the possibility of holding up the Chemical Bank in Holtsville, New York (T.109, 197-198, 218). Blanda, who cashed checks at the bank, felt it was a "good bank to rob," since there were generally no guards on duty (T.109, 165).

Over the next several months, Blanda entered the bank some six times to scout around and cash his checks; Edwards testified that he had entered the bank at least once (T.156; but see T.217). While Edwards said that he and Blanda discussed the robbery "all the time" (T.158), Edwards did not testify to even a single occasion during the six-month period when he had discussed the robbery with Sally or Linda DiStefano.[4]

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[4]Edwards also testified that he had purchased a shotgun, originally for skeet shooting, which he "converted" for use in the bank robbery by sawing off the end of the barrel (T.110-111). Edwards further noted that on May 26 -- two days before the robbery -- Blanda told him he had just committed a successful bank robbery (T.111). There is absolutely no evidence that either of these pieces of information was communicated by Edwards to Linda or Sally DiStefano, or that they were otherwise aware of them.

On the morning of May 28, 1976, Edwards awoke and found Blanda sitting in his parlor (T.112). The two men had some coffee and then determined to rob the bank that very day. They went to the methadone clinic, talked about the robbery some more, went home and got some clothes and a shotgun, and put them in a bag (T.113).[5]

Because Edwards did not have a car, either he or Blanda -- Edwards could not remember -- called Sally DiStefano's home to attempt to obtain some transport (T.113-114, 217-218). After the call to Sally's house, Blanda and Edwards had a further discussion and decided to make a trip to the bank prior to the robbery in order to determine whether a guard was there or whether the counters had been moved, "so, using the maid, we used her to take us to the bank, to case the bank again" (T.114).

Linda DiStefano and Mary Lou Morra -- Sally DiStefano's housekeeper -- picked up Edwards and Blanda at 11:30 a.m. There is no evidence that, prior to the pick-up, anyone had informed Linda that the pair intended to rob a bank or that they had decided to "case" the bank. The four individuals proceeded in Morra's car to the bank. Edwards directed Morra to stop the car, and he sent Linda into the bank to cash a dollar bill. He testified that he sent her into the bank for the purpose of determining whether there was a camera or guard there (T.115). However, Edwards did not testify that he told Linda his reason

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[5]In addition to the methadone, Edwards took a dose of phenobarbital before committing the robbery (T.210).

for sending her into the bank; to the contrary, he testified that since he did not want Morra to find out about the plan, he "cut some shade on it," and was unsure whether anything about the bank layout, the intended robbery, or the reason for driving to the bank had been discussed in the car (T.115). Linda went into the bank, came out a few minutes later, gave Edwards the change from the dollar bill, and nodded her head -- a gesture, Edwards asserted, indicating that everything was "the same" (T.116).

This testimony prompted the following colloquy:

> THE COURT: Wait a minute. How did Linda know to come back and tell you when all you did was give her a dollar to get some change?
>
> THE WITNESS: I don't know exactly how we told her to do it. I don't remember. I'm trying to remember. I can't.
>
> THE COURT: Any way, when she came out, what did she tell you?
>
> THE WITNESS: She didn't tell us. She indicated it to us that everything was the same.
>
> THE COURT: By sign language?
>
> THE WITNESS: A nod or something like that, yes.
>
> Q Mr. Edwards, after Linda DiStefano came out of the bank, did she hand anything to anybody?
>
> A. She made the change. I don't remember what she did with it.
>
> (T.116).

After Linda's return, Morra drove Blanda and Edwards to

Sally DiStefano's house. Linda and Mary Lou Morra left Edwards' presence, and neither Linda nor the maid was present in any of the events surrounding the robbery itself (T.117).

Mary Lou Morra's account of the events that morning was different in several respects from Edwards'. Ms. Morra, Sally DiStefano's housekeeper, worked at the DiStefano home three days a week. Morra remembered that Linda visited the house almost every day (T.297-300). Morra testified that on the morning of May 28, Linda was present at the DiStefano house at about 10:00 a.m. At approximately 11:30 a.m., Linda asked Morra to drive her to a spot near the Lake Ronkokoma train station, where they met Edwards and Blanda. Edwards and Blanda got into the car. They first proceeded to Edwards' house, where Edwards went in alone and came out a few minutes later (T.302-304).[6] They then proceeded to the Chemical Bank in Holtsville, New York, since "Ronnie [Blanda] wanted change. Morra pulled into the parking lot and Linda got out. A few minutes later she came back, handed Blanda $2 in dimes, and stated in what Morra took to be a joking manner, "You can make a lot of phone calls with this" (T.304). Morra made no mention of seeing a nod or any other sign.

After leaving the bank, Mary Lou and the others proceeded to Blanda's house. Blanda entered the house and came out a few

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[6]Morra could not remember him carrying anything (T.304).

minutes later. Finally, Mary Lou and Linda drove Edwards and Blanda to Sally's house. The arrived about 12:30 p.m., and Sally was there (T.305-507).

Continuing his account of the events following Linda's departure, Edwards testified that he took his bag of clothing to Sally DiStefano's room. Sally provided Edwards and Blanda with stockings and a hat for a disguise; she also called a friend to arrange for a car which they could use (T.117-119). Sally, Edwards, and Blanda then drove to a parking lot at Suffolk Community College, near the bank, where they changed the license plates and proceeded from there to the bank (T.120-121). Edwards and Blanda committed the robbery: Edwards burst into the door, making everyone lie on the floor; Blanda grabbed a teller, dragged her by the hair down to the end of the teller's cage, and demanded money. After collecting the money in a plastic bag, Blanda jumped over the counter, and the two men ran to the car, opened the door, shoved the shotgun inside, and sped away (T.122-125). The robbery netted something more than $4,000 (T.130).

The trio drove to the Suffolk Community College parking lot, where they removed the license plates. Eventually they arrived at the home of Blanda's mother. Sally said she was going to return the car, which had been borrowed from a close friend. Blanda and Edwards counted the money and divided it, taking $2,000 each, and leaving some $700 for Sally. No money was set aside or given to Linda DiStefano (T.125-130).

Later that night, Sally, Blanda, Edwards, and another friend went to New York City to buy and use some cocaine. Edwards saw that Sally had a large stack of bills with which to buy cocaine (T.140-143).[7]

On June 2, 1976, the DiStefano sisters were arrested by the police. Sally was arrested at her home by six policemen who entered without a warrant (T.326-327). As she was being handcuffed, she "became emotional," screamed, and attempted to kick a police detective (T.335). Near the time of the ruckus, Linda DiStefano walked into the house and was arrested. According to the police, when arrested, Linda was calm and "attempted to calm down her sister and stop what she was doing" (T.338).

Linda was taken to the Fourth Detective Squad, Suffolk County Police Department, where, after being apprised of her Miranda rights, she was interrogated by FBI Agent Lawrence Sweeney. According to Sweeney, Linda stated that she had been

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[7] Edwards and Blanda were arrested at the methadone clinic a few days later (T.146). A quantity of cocaine was found in the automobile; however, Edwards was never charged by state or federal authorities for this misdeed.

Following his arrest, Edwards gave a statement to the police -- a statement which falsely alleged that the robbery plan was exclusively Blanda's rather than a joint venture. At trial, Edwards admitted that this statement was a lie (T.209). But this was not the only occasion during trial when Edwards admitted lying. Thus, on cross-examination, Edwards denied having spoken to the Assistant United States Attorney about the car on a particular occasion, a fact he was forced to admit was untrue (T.181-184).

home most of the day on May 28; that she had occasionally been in the Chemical Bank in Holtsville, New York; that she was not in the bank on May 28; that she had not been together with Sally, Blanda, and Edwards on May 28, and could recall no occasion when the four had been together; that she did know Blanda and Edwards; and that, to her knowledge, neither she nor her sister had borrowed a car from Phillip Boyle, the person who allegedly lent the car to Sally (T.365-371).

Agent Sweeney made notes of the interview, which he used to prepare the 302 form. Upon receipt of the typewritten form, the agent destroyed the notes "as normal procedure" (T.371).

Following Sweeney's testimony, the Government rested,[8] and counsel for Linda DiStefano moved for a judgment of acquittal, on the ground that the proof was insufficient to establish Linda's aiding and abetting and that, with respect to the conspiracy, the evidence failed to establish that Linda's actions were knowingly in furtherance of the conspiracy. The court

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[8]In addition to the above testimony, the Government introduced a substantial amount of corroborative evidence in an effort to establish Sally's participation in the robbery, including eyewitness testimony that the car carrying the robbers contained two men and a woman similar in appearance to Sally (T.256-269); testimony that the silver gray automobile with license number 0689500 (T.269, 273) was used in the robbery and that it lost a hubcap during the escape (T.272); testimony that the license plates used in the robbery may have been stolen from an individual visiting next door to Sally's house (T.290-293); testimony from a friend of Sally's that he had lent her his silver gray car on the afternoon of the robbery and that his car, when returned, was missing a hubcap (T.315); and testimony that the police recovered from Sally's closet an empty bank bag similar to one taken from the robbery, plus $200 (T.319-327).

replied:

> I have been wrestling in my own mind for the last 24 hours, up to Agent Sweeney's testimony, but in light of Agent Sweeney's testimony, I must deny it.
>
> (T.387).

B. Summation, Charge, and Verdict

In the Government's summation, the Assistant United States Attorney placed great emphasis upon Linda DiStefano's allegedly false exculpatory statement, arguing that she would not have made such a statement unless she were part of an illegal plan to rob the bank (T.461A-462A):

> I submit to you, ladies and gentlemen of the jury, why would Linda DiStefano have told an untruth about these facts unless she knew she was part of the plan and she knew that she was guilty of what the FBI was charging her with?
>
> Why would she have lied? What motivation would she have had? If she wasn't [sic] innocent, why would she have said these things which have the earmarks of a person trying to get out of something?
>
> I suggest to you, ladies and gentlemen of the jury, that you have the statement from Linda DiStefano's own mouth to implicate her.
>
> (T.462A-463A).

Reference was again made to the "false exculpatory statement" in the prosecutor's rebuttal summation (T.532A).

In its charge to the jury, the court instructed as follows on the false exculpatory statement:

> Evidence has been introduced that the defendant in this case, Linda DiStefano, made

> certain exculpatory statements or claimed statements outside of this courtroom, explaining her actions.
>
> If the jury finds such statements were untrue and the defendant made them with knowledge of their falsity, the jury may consider the statements as circumstantial evidence of the defendant's guilt.
>
> (T.484A).

On the morning of July 29, 1976, the jury retired for deliberations (T.444). Fifteen minutes later, the jurors returned and requested Edwards' testimony concerning Linda DiStefano and a "clear definition of aiding and abetting especially in a conspiracy" (T.450-451). Edwards' testimony was read to the jury (T.458-463), and the court repeated its earlier instruction on willful participation in a conspiracy and on aiding and abetting (T.454-457). The following day, at 4:30 p.m., the jury found appellant Linda DiStefano guilty of Counts One and Three of the indictment, acquitting her of Count Two.[9]

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[9]At 4:15 p.m., the foreman first announced that a decision had been reached and that appellant Linda DiStefano had been found guilty of one count of bank robbery and conspiracy. However, when the poll of the jury reached Juror #11, the juror claimed that his verdict was not the verdict as read.

The court ordered the jury to return for further deliberations (T.474), and a motion by the defense for a mistrial, which contended that the eleven-to-one disagreement over the verdict having been arrived at in open court, further deliberations would be inherently coercive (T.475), was denied.

The jury returned five minutes later, and Juror #11 referred to the fact that the Clerk, when reading the verdict, had not indicated that guilt was on the theory of aiding and abetting. After having received an explanation that the counts charged aiding and abetting, the juror indicated his assent to the verdict as read (T.478).

ARGUMENT

Point I

THE GOVERNMENT FAILED TO PROVE APPELLANT LINDA DiSTEFANO'S GUILT OF CONSPIRACY OR AIDING AND ABETTING A BANK ROBBERY.

Following submission of the Government's case, the defense moved for a judgment of acquittal, arguing that the evidence failed to show the requisite knowing participation or knowing agreement sufficient to sustain a conviction for either conspiracy or aiding and abetting a bank robbery. Relying heavily on Sweeney's testimony of Linda DiStefano's false exculpatory statement, the court denied the defense motion. We respectfully submit that the court's conclusion was erroneous.

To prove appellant Linda DiStefano's guilt of conspiracy, the Government had to show that there was a knowing agreement, of which appellant was a part, to rob a bank. See Iannelli v. United States, 420 U.S. 770, 777-779 (1975). At the very least, "[t]here must be some basis for inferring that the defendant knew about the enterprise and intended to participate in it or to make it succeed." United States v. Cirillo, 499 F.2d 872, 883 (2d Cir. 1974); see United States v. Johnson, 513 F.2d 819, 823 (2d Cir. 1975); United States v. Amato, 495 F.2d 545, 550 (5th Cir. 1970), cert. denied, 419 U.S. 1013 (1974). Similarly, to prove appellant Linda DiStefano's guilt of aiding and abetting

the Edwards-Blanda bank robbery, the Government was required to show that the defendant "consciously assisted the commission of the specific crime in some active way." United States v. Dickerson, 508 F.2d 1216, 1219 (2d Cir. 1975); see Nye & Nissen v. United States, 336 U.S. 613, 619 (1949).

Here, there is simply no evidence of appellant Linda DiStefano's knowing agreement or participation in the bank robbery. Specifically, the facts testified to by Edwards, viewed most favorably to the Government,[10] fail to show (1) that Linda was ever made aware (or in fact was aware) that Edwards and Blanda were about to rob a bank or (2) that Linda knew or intended that her innocuous act of cashing a dollar bill would be part of a bank robbery plan. See United States v. Infanti, 474 F.2d 522, 526 (2d Cir. 1974); United States v. Gallishaw, 428 F.2d 760 (2d Cir. 1970).

First, there is no evidence that, prior to May 28, 1976, Linda DiStefano was ever informed of Edwards' and Blanda's tentative bank robbery plans. While Edwards admitted frequently discussing the plans with Blanda, he failed to mention a single discussion of the plan with Linda or Sally DiStefano prior to May 28, this despite Edwards' assertions that he frequently met with the DiStefano sisters.

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[10] See, e.g., Glasser v. United States, 315 U.S. 60, 80 (1942); United States v. Johnson, 513 F.2d 819, 821 (2d Cir. 1975); United States v. Koss, 506 F.2d 1103, 1106 (2d Cir. 1974).

Similarly, there is no evidence that Linda or Sally became aware of the bank robbery scheme from Edwards' early morning telephone call on May 28. Edwards asserted that either he or Blanda called the DiStefano house some time after they had determined to rob the bank. However, Edwards failed to state that he did anything more during the telephone call than to inform the party at the other end of the line that he needed transportation. If Edwards had told Linda over the telephone that he was about to rob a bank, it must be presumed that, under questioning by the prosecutor, he would have so testified, and his failure to do so must mean that it did not occur.

Moreover, it would have been impossible for Edwards or anyone else to have said during the telephone conversation that Edwards and Blanda had decided to case the bank before robbing it. According to Edwards, that decision apparently was not made by himself and Blanda until after the telephone call.

Nor is the missing proof of knowing participation supplied by Edwards' discussion during the auto ride to the bank with Linda and Mary Lou Morra on the morning of May 28. As Edwards testified, he and Blanda attempted to "cut some shade" on their plans while they were travelling to the bank, and as also stated at trial, he was unsure whether anything about the bank layout, the intended robbery, or the reason for driving to the bank had been discussed in the car (T.115). In sum, Edwards' testimony is devoid of evidence that Linda was ever made aware of the conspiracy, either prior to May 28, during the telephone call

that morning, or during her presence in the car with Edwards and Blanda.

Thus, the only evidence evenly remotely indicative of Linda's participation with knowledge in the bank robbery was her unelucidated cashing of a dollar bill and her unelucidated nod after returning to the car. Absent further evidence of Linda's knowledge, these equivocal acts are woefully insufficient to establish Linda's guilt beyond a reasonable doubt of aiding and abetting a bank robbery or conspiracy to rob the bank. United States v. Infanti, supra;[11] United States v. Cirillo, supra, 499 F.2d at 884-885; United States v. Johnson, supra. Since there is no proof that Linda was informed by

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[11] A comparison between Infanti and the present case is instructive: There, Kurtz, an attorney, and Infanti purchased tickets and travelled to Germany to negotiate the transfer of what were shown to be stolen stock certificates for 40% of their market value. Kurtz was present during the attempted negotiation of the stock. During those negotiations, the individuals who were to buy the certificates attempted to write down the certificate numbers. At that point, Infanti retrieved the certificates and refused to allow the buyers to continue writing. Following the meeting, which did not result in a sale, Kurtz and Infanti went to London and then flew to New York, where they were arrested upon arrival. At that time Kurtz also uttered a false exculpatory statement.

Despite Kurtz's essential presence during the negotiations -- negotiations that "would have been obvious to Kurtz, a lawyer, ... were less than legitimate," despite his quick detour to London and his false exculpatory statement, this Court found the evidence insufficient to establish a jury question of Kurtz's guilt. United States v. Infanti, supra, 474 F.2d at 522-523.

Here, the evidence of guilty knowledge is far weaker. Linda DiStefano was an impressionable young woman, not an experienced attorney; DiStefano stood to receive no reward, not an attorney's fee.

Blanda and Edwards of the plan on or before May 28, the proof does not even show that Linda was aware of the alleged purpose of cashing the dollar bill -- to check the surveillance cameras. And even assuming, arguendo, that she was somehow telepathically made aware that she was going into the bank to determine the location of the surveillance cameras, the evidence failed to show that Edwards or Blanda ever told Linda the more important fact that the ultimate reason she was sent in was to help effect a bank robbery soon to be enacted by Edwards and Blanda rather than to aid some other illegal act, such as an attempt to forge a check, or some perfectly legal activity. Absent the crucial evidence that Linda was aware that a bank robbery was planned, her single act of cashing a dollar bill cannot prove her knowing participation in the robbery. United States v. Infanti, supra, 474 F.2d at 526; see Direct Sales Co. v. United States, 319 U.S. 703 (1943); United States v. Gallishaw, supra. Instead, the evidence shows only her prior association with Edwards and Blanda and her presence with them that morning. Such evidence is utterly insufficient to establish conspiracy or aiding and abetting. United States v. Johnson, supra, 513 F.2d at 819; United States v. Irons, 475 F.2d 40 (8th Cir.), cert. denied, 412 U.S. 951 (1973); Bailey v. United States, 416 F.2d 1110 (D.C. Cir. 1969); see United States v. Infanti, supra.

The weakness of the Government's case is even more evident when it is remembered that the evidence conclusively showed that appellant had no "stake in the venture." United States v. Amato,

supra, 495 F.2d at 580; United States v. Cianchetti, 315 F.2d 584 (2d Cir. 1963). According to Edwards, he and Blanda took $2,000 apiece, and Sally was given $700, yet he failed to mention a single penny laid aside for Linda.

In analyzing sufficiency issues, each case turns upon its facts, and precedents are not determinative. United States v. Pina, Doc. Nos. 76-1320, 1343, slip op. 675 (2d Cir., December 1, 1976). It is important to recognize that here, unlike Pina, a great quantity of the Government's proof came not from circumstantial evidence, but from direct testimony of the principal conspirator himself, Edwards. And while circumstantial evidence may permit the jury to make inferences unfavorable to the defendant, the evidence here may not be stretched so broadly. Surely, if Linda had been informed prior to May 28 that a bank robbery was planned, Edwards would have known, and would have so testified. Surely, had Linda been made aware of the bank robbery plan by the call on the morning of May 28, Edwards would have so testified. Surely, had Edwards or anyone else told Linda of the bank robbery and the importance of her participation during the automobile ride, Edwards would have so testified. Edwards' failure to elucidate facts which, had they occurred, were completely within his knowledge not only gives rise to an inference that the facts did not occur (II WIGMORE ON EVIDENCE §285 (3d ed. 1940)), but renders the Government's proof utterly insufficient to establish conspiracy or aiding and abetting.

The court recognized the weakness of the Government's case, but determined that, in light of DiStefano's false exculpatory statement, the proof of guilt was sufficient. That determination is at odds with decisions of this Court, that

> falsehoods told by a defendant in the hope of extricating himself from suspicious circumstances are insufficient proof upon which to convict where other evidence is weak and where the evidence before the court is as hospitable to an interpretation consistent with the defendant's innocence as it is to the Government's theory of guilt.
>
> United States v. Johnson, supra, 513 F.2d at 824.

See United States v. Steinberg, 525 F.2d 1126, 1134 (2d Cir. 1975), cert. denied, 96 S.Ct. 2167 (1976); United States v. Kearse, 444 F.2d 62 (2d Cir. 1971). Here, appellant DiStefano had just witnessed her sister's home invaded by six agents, her sister handcuffed and led away. Moreover, as a result of her constant association with Sally and her not infrequent visits with Edwards and Blanda, Linda may very well have been convinced -- correctly -- that she was under suspicion. Under such circumstances, an innocent person might have denied having entered the very bank robbed on May 28, or having met the robbers. Here, as in Johnson, the statements are at worst falsehoods told in the hope of extricating herself from suspicious circumstances. And, since the Government's case points more toward appellant's innocence than to her guilt, the addition of Linda's false exculpatory statement cannot make this a submissible case. Accordingly, the judgment should be reversed and the indictment dismissed.

Point II

THE TRIAL COURT'S ERRONEOUS AND MISLEADING INSTRUCTION ON APPELLANT'S FALSE EXCULPATORY STATEMENT COMPELS REVERSAL.

As a further reason requiring reversal, a new trial must be granted because of the trial court's erroneous and misleading instruction on how the jury should evaluate Linda's false exculpatory statement. The court below charged:

> Evidence has been introduced that the defendant in this case, Linda DiStefano, made certain exculpatory statements or claimed statements outside of this courtroom, explaining her actions.
>
> If the jury finds such statements were untrue and the defendant made them with knowledge of their falsity, the jury may consider them as circumstantial evidence of the defendant's guilt.

(T.484A); (emphasis added).

The above instruction qualitatively overstated the value of such evidence. False exculpatory statements are admissible not as evidence of guilt, but as evidence of consciousness of guilt. See, e.g., United States v. Lacey, 459 F.2d 86, 89 (2d Cir. 1972); United States v. Johnson, 513 F.2d 819, 824 (2d Cir. 1975); United States v. Kearse, 444 F.2d 62 (2d Cir. 1971); United States v. DeAlesandro, 361 F.2d 694, 697-698 (2d Cir.), cert. denied, 385 U.S. 842 (1966). The difference is substantial. The court's instruction simply that the jury might find guilt allows the jury to find proof of the elements of the

crime from the statement. In contrast, a reference of consciousness of guilt allows the jury, if it wishes, to find, from evidence of the statement, that the defendant evinced feelings of guilt. Only then is the jury permitted, but not required, to consider feelings of guilt as evidence tending to show actual guilt. Miller v. United States, 320 F.2d 767, 773 (D.C. Cir. 1963).

Moreover, the court's charge failed to explain in any way the weakness of this form of evidence. This Court has recognized that a false exculpatory statement may not even reflect feelings of guilt (United States v. Infanti, 474 F.2d 522 (2d Cir. 1974)), and that, even if it does, an innocent person may tell falsehoods in an effort to extricate himself from suspicious circumstances. United States v. Johnson, supra, 513 F.2d at 824; United States v. Kearse, supra; United States v. Steinberg, supra, 525 F.2d at 1134. In an analogous area, it has been held that the giving of an instruction on flight from the scene of the crime, relevant to consciousness of guilt, without a qualification about the various motives that can prompt flight, constitutes reversible error (Austin v. United States, 414 F.2d 1155 (D.C. Cir. 1969)), and, in appropriate cases, plain error (United States v. Vereen, 429 F.2d 713 (D.C. Cir. 1970)).

Here, not only was there no caution on the use of such evidence, but the court's instruction failed even to limit the effect of the evidence to that of consciousness of guilt.

On the facts of this case, where the evidence is sufficient, if at all, "only by a hair's breadth" (United States v. Lefkowitz, 284 F.2d 310, 315 (2d Cir. 1960)), the court's misleading charge must be held plain error. For there can be no doubt that, given the extremely weak case presented by the Government, the allegedly false exculpatory statement was a crucial piece of evidence. In fact, the court below indicated that, to its mind, the statement may have been the difference between granting and denying a motion to dismiss. The actual importance of the statements to its case was not lost on the Government, which emphasized in its argument that no innocent person would lie under such circumstances (T.462A-463A). The court's charge, which permitted the jury to give undue weight to this evidence, was erroneous, mandating a reversal.

Point III

THE DESTRUCTION BY AGENT SWEENEY OF HIS NOTES ON APPELLANT'S STATEMENTS CONSTITUTES REVERSIBLE ERROR IN LIGHT OF THE IMPORTANCE OF THE STATEMENTS TO THE GOVERNMENT'S CASE.

During FBI Agent Sweeney's testimony, he described how he secured and took down notes of DiStefano's post-arrest statement. Agent Sweeney then used the notes to make a 302 statement. After allegedly comparing the notes to his 302 statement, Agent Sweeney destroyed them (T.371).

The destruction of the notes is reversible error in light of the importance of the statements to the Government's case and the weakness of the other evidence against appellant. See United States v. Harris, ___ F.2d ___ (9th Cir. Doc. No. 76-1317, September 23, 1976); United States v. Johnson, 525 F.2d 999 (2d Cir. 1975), cert. denied, 424 U.S. 920 (1976); United States v. Harrison, 524 F.2d 421 (D.C. Cir. 1975); United States v. Johnson, 521 F.2d 1318 (9th Cir. 1975).

The notes taken by Sweeney were possible Jencks Act (18 U.S.C. §3500) material, or discoverable under the Federal Rules of Criminal Procedure. See United States v. Harris, supra. Furthermore, the statements may have contained material required to be given to the defense under Brady v. Maryland, 373 U.S. 83 (1963). As the Court wrote in United States v. Harrison, supra, 524 F.2d at 427-428:

> It seems too plain for argument that rough notes from any witness interview could prove to be Brady material. Whether or not the prosecution uses the witness at trial, the notes could contain substantive information or leads which would be of use to the defendants on the merits of the case. If the witness does testify, the notes might reveal a discrepancy between his testimony on the stand and his story at a time when the events were fresh in his mind. The discrepancy would obviously be important for use in impeaching the witness' credibility. The possible importance of the rough notes for these purposes is not diminished in cases where the prosecutor turns over to the defense the 302 reports. The 302 reports contain the agent's narrative account of the witness's statement, prepared partly from the rough notes and partly from the agent's recollection of the interview. Although the agents are trained to include all the pertinent information in the 302 report, there is clearly room for misunderstanding or outright error whenever there is a transfer of information in this manner. In the best of good faith, the statement as recorded in the 302 report may, to some degree at least, reflect the input of the agent. In such a situation, the information contained in the rough notes taken from the witness himself might be more credible and more favorable to the defendant's position.

The notes may well have shown that, in re-writing the post-arrest statement, the agent, even inadvertently, changed its content or meaning.

Finally, there is simply no question of harmless error here. As already noted, the Government relied heavily upon the statements, and the other evidence of guilt certainly was weak, if not insufficient. Given the importance of the statement and the error in the destruction of the notes, the judg-

ment of conviction must be reversed for a new trial at which the Government will not be able to introduce the false exculpatory statement.

CONCLUSION

For the foregoing reasons, the judgment of the district court must be reversed and the indictment dismissed. In the alternative, the judgment must be reversed and the case remanded for retrial without use of the false exculpatory statement.

Respectfully submitted,

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CERTIFICATE OF SERVICE

March 14, 1977

I certify that a copy of this brief [redacted] has been mailed to the United States Attorney for the Eastern District of New York.

David J. Gottlieb